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DOCKET NO.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

In the Matter of the Application

of

KATHY SHIRILLA, as Personal  
Representative of the Estate  
of Donald Andrew Taylor,  
Deceased,

Petitioners,

vs.

CLAY SMALLWOOD, et al,

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

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No. \_\_\_\_\_

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KATHY SHIRILLA, as Personal  
Representative of the Estate  
of Donald Andrew Taylor,  
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vs.

CLAY SMALLWOOD, et al,

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

The Petitioner, Kathy Shirilla respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 31, 1983.

QUESTIONS PRESENTED

1. Has the Court of Appeals for the Ninth Circuit failed to follow the analysis established by this Court in determining the most analogous statute of limitations to apply

to an action brought under 42 U.S.C. § 1983, in that it has failed to characterize the nature of the federal claim and the federal policies involved?

2. Has the Court of Appeals for the Ninth Circuit allowed the Oregon Legislature to dictate to that court the limits to be placed on the enforcement of a federal right?

3. Has the Court of Appeals for the Ninth Circuit applied the wrong Oregon Statute of Limitations to an action brought under 42 U.S.C. § 1983, because the statute which was applied is not the most analogous state statute?

4. Whether in applying Oregon's two-year statute of limitations to this action brought under 42 U.S.C. § 1983 the Court of Appeals for the Ninth Circuit has applied a statute which is inconsistent with the federal policies of 42 U.S.C. § 1983?

#### PARTIES TO THE PROCEEDING

Additional Defendants not listed in the

caption:

Gerry Riste

Verlon Denton

Thomas Henderson

Ted Hawkinson

Gary Findley

Sam Dotson

A.D. Insley

Robert Schlander

William Wallace

Fred Hunt

Donald Smith

State of Oregon

Curry County

City of Brookings

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### OPINIONS BELOW

The unpublished memorandum of the Court of Appeals appears in the Appendix to this Petition. The District Court for the District of Oregon did not render an opinion in this case. It did adopt the Findings and Recommendations of Magistrate Hogan. A copy of the Magistrate's Findings and Recommendations also appears in the Appendix of this Petition.

### JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 31, 1983. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL & STATUTORY PROVISIONS

ORS 30.020 Action for wrongful death; when commenced; damages. (1) When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the decedent's surviving spouse, surviving children, surviving parents and other individuals, if any, who under the law of intestate succession of the state of the decedent's domicile would be entitled to inherit the personal property of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action,

had he lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within three years after the occurrence of the injury causing the death of the decedent.

ORS 30.265 Scope of liability of public body, officers, employes and agents. (1) Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employes and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598. As used in ORS 30.260 to 30.300, "tort" includes any violation of 42 U.S.C. § 1983.

(2) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

(a) Any claim for injury to or death of any person covered by workers' compensation law.

(b) Any claim in connection with the assessment and collection of taxes.

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

(d) Any claim which is limited or barred by the provisions of any other statute.

(e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.

(f) Any claim arising out of an act done or omitted under apparent authority of law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

(4) ORS 30.260 to 30.300 do not apply to any claim against any public body or its officers, employees or agents acting within the scope of their employment arising before July 1, 1968. Any such claim may be presented and enforced to the same extent and subject to the same

procedure and restrictions as if ORS 30.260 to 30.300 had not been adopted.

(5) The amendment to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against the state or its officers, employees or agents acting within the scope of their employment or duties arising before July 2, 1975. Any such claim may be presented and enforced to the same extent and is subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted, but the procedure set forth in ORS 278.120 shall be applicable thereto.

(6) ORS 30.287 and the amendments to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against any local public body or its officers, employees or agents acting within the scope of their employment or duties, arising before December 31, 1975. Any such claim may be presented and enforced to the same extent and subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted.

ORS 30.275 Notice of claim; time of notice; time of action.

(8) Except as provided in ORS 12.120 and 12.135, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or

omission of a public body or an officer, employe or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS," and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and states of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the

said courts in the trial and disposition of the cause, and, if it is a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 198, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

#### STATEMENT OF THE CASE

On January 13, 1978, Petitioner's decedent Donald Andrew Taylor was lawfully operating his automobile on a public road near the City of Brookings in Curry County, Oregon, when a Curry County deputy sheriff, dressed in plain clothes, stepped in the path of the vehicle, pointed a shotgun at Taylor, and commanded him to stop. (R. 30, p. 4). He was forced off the roadway, drove back on the roadway, but was rammed in the side by a Curry County Sheriff patrol car which had been hidden alongside the road. Another deputy, also in plain clothes, aimed a gun at Taylor and ordered him to stop. While Taylor was complying with the command, and slowing his vehicle to a stop, a third deputy shot Taylor three times in the back

through the rear of the car with a high powered rifle. (R. 30, pp. 4 and 5). Taylor died of his wounds at the scene of the shooting.

Petitioner alleges that the Defendants conspired to and did violate the rights of her decedent as secured by the constitution of the United States, depriving him of his life without due process of law, by summarily executing decedent Taylor, United States Constitution Amendment XIV.

Pursuant to ORS 30.020, which provides for the institution of actions for wrongful death by a personal representative within 3 years of an alleged tortious homicide, Petitioner filed an action for damages and demand for jury trial under 42 U.S.C. § 1983 in the United States District Court for the District of Oregon on January 12, 1981. Jurisdiction is based on that statute and 28 U.S.C. §§ 1331 and 1343.

Defendants moved to dismiss Petitioner's amended complaint on the ground that the action was barred by the two-year statute of limitations contained in the Oregon Tort Claims Act as that act had been applied in Kosikowski v. Bourne, 659 F2d 105 (9th Cir. 1981).

On December 1, 1981, Magistrate Hogan issued Findings and Recommendations in favor of dismissal of the second amended complaint, on the grounds that it was time barred under the con-

struction of the Oregon Tort Claims Act, ORS 30.275(8), and adopted by the Court of Appeals for the Ninth Circuit in Kosikowski, supra. (R. 46).

On January 8, 1982, the United States District Court for the District of Oregon, Belloni, J. affirmed the Findings and Recommendations and ordered that the second amended complaint be dismissed as barred by ORS 30.275(8). (R. 53). On January 11, 1982, the District Court entered Judgment for Defendants. (R. 54).

Petitioner appealed that judgment to the Court of Appeals for the Ninth Circuit which on May 31, 1983 issued a Memorandum Opinion affirming the District Court's dismissal.

#### REASONS FOR GRANTING CERTIORARI

1. The decision below conflicts with decisions of this Court as to the proper analysis to be used in determining the most analogous state statute of limitations to apply to an action arising under 42 U.S.C. § 1983.

2. The decision below conflicts with the decisions of other courts of appeals as to the proper analysis to be employed in determining the appropriate statute of limitations to be applied in an action arising under 42 U.S.C. § 1983.

3. The decision below raises a significant and possibly far reaching question concerning

the ability of the state to limit its liability for constitutional torts in a manner which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER ANALYSIS TO BE USED IN DETERMINING THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS TO APPLY TO AN ACTION ARISING UNDER 42 U.S.C. § 1983.

Pursuant to 42 U.S.C. § 1988, this court has determined that in applying a statute of limitations to actions brought under 42 U.S.C. § 1983 it is appropriate to "borrow" the most analogous state statute of limitations, O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed2d 980 (1914). Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed2d 440 (1980).

In determining which state statute of limitations is most appropriate a federal court is to examine the nature of the federal claim and the federal policies involved, Board of Regents v. Tomanio, *supra*; United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed2d 732 (1981); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed2d 192 (1966). The characterization of an action for the purpose of selecting an appropriate statute of limitations is a question of federal

law, Auto Workers v. Hoosier, supra.

As stated by the Court of Appeals for the Third Circuit, selecting the appropriate state statute of limitations "requires characterization of the essential nature of the federal claim within the scheme created by the various state statutes of limitation." Davis v. United States Steel Supply, 581 F2d 335 (3rd Cir. 1978).

In affirming the dismissal by the United States Court for the District of Oregon the Court of Appeals for the Ninth Circuit relied on its earlier decision in Kosikowski v. Bourne, 659 F2d 105 (9th Cir. 1981). In Kosikowski, supra, the Court of Appeals for the Ninth Circuit failed to undertake any characterization of the claim and deferred entirely to a statement by the Oregon Legislature that a two-year statute of limitations applies to all actions brought under 42 U.S.C. § 1983, (ORS 30.265(1)). In deferring to the actions of the Oregon Legislature, the Court of Appeals for the Ninth Circuit failed to make any determination regarding what state statute of limitations would be most analogous to this action brought for the deprivation of life without due process of law. In so doing, the Court of Appeals for the Ninth Circuit failed to undertake the proper, or any, analysis to characterize the nature of the federal claim

as required by decisions of this court, United Parcel Service, Inc. v. Mitchell, supra; Auto Workers v. Hoosier, supra.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER ANALYSIS TO BE EMPLOYED IN DETERMINING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED TO AN ACTION ARISING UNDER 42 U.S.C. § 1983.

Decisions of the Courts of Appeals for the Third and Fourth Circuits are in conflict with the approach taken by the Court of Appeals for the Ninth Circuit in this case.<sup>1</sup>

The Court of Appeals for the Third Circuit has determined that the "selection of the appropriate state limitations provision 'requires characterization of the essential nature of the federal claim within the scheme created by various state statutes of limitation'", Knoll v. Springfield Township School District, 699 F2d 137, 140 (3rd Cir. 1983), appeal pending, quoting, Davis v. United States Steel Supply, supra. In this case the

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1. The Court of Appeals for the Eighth Circuit may also be in conflict with the Ninth Circuit, See, Garmon v. Foust, 668 F2d 400 (8th Cir. 1982) cert den, US       , 102 S.Ct. 2283, 73 L.Ed2d 1294 (1982); Rosales v. Lewis, 454 F.Supp 956 (D.C.S.D. Iowa 1978).

Court of Appeals for the Ninth Circuit has not made any attempt to characterize the essential nature of the claim but has simply deferred to the Oregon Legislature.

The Court of Appeals for the Fourth Circuit has determined that "a state limitation period which evidences hostility or discrimination toward a federal cause of action will not be adopted by federal courts," Johnson v. Davis, 582 F2d 1316, 1318 (4th Cir. 1978). The fourth circuit had previously ruled that Virginia's two-year statute of limitations for personal injury would apply to § 1983 actions, Almond v. Kent, 459 F2d 200 (4th Cir. 1972). Following that decision the Virginia General Assembly enacted an amendment which purported to specifically limit the period of time during which actions arising under 42 U.S.C. § 1983 could be brought to one year. Just as Oregon has done in this case, the Virginia General Assembly attempted to provide a shorter statute of limitations for § 1983 actions than for an analogous tort action.

The Court of Appeals for the Fourth Circuit in Johnson refused to impose the one-year statute of limitations. In part the reason for that Court's refusal to impose the one year period of limitations was

"there is no rational basis for distinguishing between § 1983 actions and actions for injury to the person in light of the purposes for which statutes

of limitations are generally prescribed. These statutes are statutes of repose whose intent is to secure the prompt enforcement of claims during the lives of witnesses and when their recollection may be presumed to be still unimpaired. Campbell v. Haverhill, 155 US 610, 15 S.Ct. 217, 39 L.Ed 280 (1895). The facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for § 1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." Johnson, supra at 1319.

Both the third and fourth circuits have recognized that in adopting statutes of limitations states attempt to balance two competing interests. These are: 1) the right to a remedy by plaintiffs who have been wronged by actions of others; and 2) the protection of the court system from the prosecution of stale claims. When the State of Oregon balanced these two factors, its determination was that in cases of wrongful death, plaintiffs should have three years in which to bring their actions, ORS 30.020(1). This is the statute of limitations which petitioner urges in this case. When considering its own liability for wrongful death, the State of Oregon limited actions to those brought within

two years. Private defendants in Oregon are subject to suit for three years from the date of their wrongful act, whereas the State of Oregon is only liable for two years for its wrongful act.

While it is appropriate to borrow a state's statute of limitations which has been wrought in the neutral forge of the state legislature governing disputes among its own citizens, it is inappropriate and inconsistent with the federal interests involved to adopt that statute of limitations which is designed solely to protect the state treasury. Just as in Johnson, ". . . absent some other reasonable basis for applying a shorter period of remedying a constitutional tort' than for remedying the underlying state tort, . . ." Johnson, supra at 1319, the Court of Appeals for the Ninth Circuit should have joined the third and fourth circuits and disregarded the special limitations placed on § 1983 actions by the Oregon Legislature.

3. THE DECISION BELOW RAISES A SIGNIFICANT AND POSSIBLY FAR REACHING QUESTION CONCERNING THE ABILITY OF A STATE TO LIMIT ITS LIABILITY FOR CONSTITUTIONAL TORTS IN A MANNER WHICH SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OR JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. At common law states were immune from suit by their own citizens through the doctrine of sovereign immunity. The state, as a defendant in an action under 42 U.S.C. § 1983, however, would stand in the same position as a private person because there would be no immunity, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed2d 492 (1961).

The doctrine of sovereign immunity, while still available, has been waived by many states in certain instances with the enactment of what have come to be called tort claims acts. The sole purpose of these acts is to define the extent to which states have waived their immunity to suit. In its tort claims act the State of Oregon has waived its immunity to suit for wrongful death only to the extent that it will be liable if those actions are brought within two years. Thus the state is accorded favored treatment when compared with that of private defendants who are subject to actions for wrongful death for three years. This situation is perfectly legitimate within the context of the doctrine of sovereign immunity.

In grafting onto its tort claims act a statement that actions brought under 42 U.S.C. § 1983 shall be governed by that act the State of Oregon has attempted to waive what it never had -- immunity to suit from federal civil rights actions.

The Court of Appeals for the Ninth Circuit in this case has allowed this purported immunity to arise even though that court itself has held that congress "has never indicated an intent to engraft on to the federal rights state concepts of sovereign immunity or of states susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed, the history of Section 1983, summarized in Monroe v. Pape, supra, 375 US 167, 81 S.Ct. 473, 5 L.Ed2d 492, vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act." Donovan v. Reinbold, 433 F2d 738, 742 (9th Cir. 1970).

Although the State of Oregon has not claimed complete immunity to suit for the deprivation of life without due process of law it has granted itself partial immunity through the device of limiting the bringing of that action to two years under the Tort Claims Act. Absent the Oregon Tort Claims Act, the State of Oregon would be subject to suit for three years. Through the device of the Oregon Tort Claims Act the State has granted itself a one year immunity to suit.

This device, if allowed to stand, would significantly hamper the ability of citizens

to enforce federal rights against the state. If the Oregon Legislature is allowed to establish this partial immunity and thereby protect its treasury the device will be quickly recognized by other states seeking to frustrate the enforcement of federal rights. Accepting the decision of the Court of Appeals for the Ninth Circuit in Kosikowski and in this case invites the states to rely on the concepts of sovereign immunity, a concept foreign to federal civil rights actions, and frustrate the enforcement of federal rights.

In addition, the holding of the Court of Appeals for the Ninth Circuit has further confused the application of state statutes of limitation in the U.S. Court for the District of Oregon. That court has read Kosikowski to extend the statute of limitations in the Oregon Tort Claims Act to apply to actions brought against private defendants under 42 U.S.C. § 1981, Loiseau v. Department of Human Resources, 558 F.Supp 521 (D.C. Or 1983).

B. In this case the Court of Appeals for the Ninth Circuit relied on its opinion in Kosikowski v. Bourne, supra. That opinion evidences a fundamental misunderstanding of the ordered relations between the states and the federal government. Since the opinion in this case was a memorandum opinion only it is nece-

ssary to refer to Kosikowski to understand the court's reasoning. In that opinion the court says "this precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellant's cause of action in the manner employed by this court in, Clark v. Musick, 623 F2d 89 (9th Cir. 1980)." Kosikowski, supra at 107.

Subsequently the court holds: "We must accept the decision of the Oregon Legislature to apply the two year statute of limitations to § 1983 actions" Kosikowski, supra at 107 (emphasis added).

In Kosikowski it is evident that the Court of Appeals for the Ninth Circuit is under the impression that it was compelled to follow the dictates of the Oregon Legislature. 42 U.S.C. § 1988 admonishes the courts to turn to "the common law, as modified and changed by the constitution and the statutes of the [forum] state" so long as it is "not inconsistent with the constitution and laws of the United States." As stated in Knoll v. Springfield Township School District, ". . . when poured into the federal vessel, the state statute becomes a federal legal precept, and all aspects of the proceedings must be measured by the federal interests implicated in the case. Knoll, supra at 141.

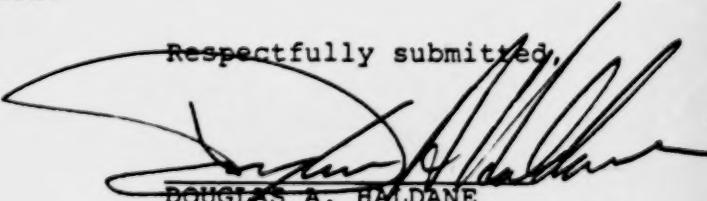
If the decisions of the Court of Appeals for the Ninth Circuit in this case and in Kosikowski are allowed to stand it will imply a power on the part of the states to dictate the extent to which federal rights will be protected in the federal courts.

Oregon's statutory scheme has created a favored position for the state and is thus discriminatory against those seeking to enforce their federal rights.

#### CONCLUSION

WHEREFORE, Petitioner prays that this court issue its writ of certiorari to the Court of Appeals for the Ninth Circuit to review that court's decision.

Respectfully submitted,



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NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KATHY SHIRILLA, as Personal Repre-	) Filed
sentative of the Estate of Donald	) May 31, 1983
Andrew Taylor, Deceased,	) Phillip B.
	) Winberry
Plaintiff-Appellant,	) Clerk, U.S.
	) Court of
vs.	) Appeals
	)
CLAY SMALLWOOD, et al.,	) No. 82-3050
	) DC CV 81-6005
Defendant-Appellee.	) MEMORANDUM

Appeal from the United States District Court  
for the District of Oregon The Honorable  
Robert C. Belloni, District Judge Presiding  
Argued and Submitted on May 5, 1983

BEFORE: CHOY and CANBY, Circuit Judges, and  
MARQUEZ\*, District Judge

The district court correctly held that  
this case was controlled by Kosikowski v.  
Bourne, 659 F.2d 105 (9th Cir. 1981). Or.  
Rev. Stat. § 30,275 (3) is the statute of  
limitations applicable to all § 1983 actions  
including those seeking recovery for violations  
resulting in death. We therefore affirm.

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\*The Honorable Alfredo Marquez, United  
States District Judge for the District of  
Arizona, sitting by designation.

A-2

Jan 8, 1982

Robert M. Christ, Clerk

By Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KATHY SHIRILLA, as Personal )  
Representative of the Estate) )  
of Donald Andrew Taylor, )  
Deceased, )

Plaintiff, )

vs. )

CLAY SMALLWOOD, et al, )

Defendants. )

CIVIL NO. 81-6005

ORDER

I have made a de novo review of those portions of Magistrate's findings and recommendation to which objection has been made.

I fully agree with the Magistrate's recommended disposition and affirm.

IT IS ORDERED that this action is dismissed. The Clerk is directed to enter judgment accordingly.

DATED: January 8, 1982.

United States District  
Judge

U.S. District Court  
District of Oregon  
Southern Division

FILED

Dec - 1 1981

ROBERT M. CHRIST, CLERK  
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

KATHY SHIRILLA, as Personal  
Representative of the Estate  
of Donald Andrew Taylor,  
Deceased,

Civil No.  
81-6005-E

Plaintiff,

FINDINGS AND  
RECOMMENDATION

vs.

CLAY SMALLWOOD, Sheriff,  
Curry County;  
TED HAWKINSON, Deputy Sheriff,  
Curry County;  
GARY FINLEY, Deputy Sheriff,  
Curry County;  
GERRY RISTE, Deputy Sheriff,  
Curry County;  
VERLON DENTON, Deputy Sheriff,  
Curry County;  
THOMAS HENDERSON, Deputy Sheriff,  
Curry County;  
SAM DOTSON, City Police Officer,  
City of Brookings;  
ROBERT SEHLANDER, Deputy District  
Attorney, Curry County;  
WILLIAM WALLACE, District Attorney,  
Curry County;  
FRED HUNT, Deputy Sheriff,  
Curry County;  
DONALD SMITH, Police Officer,  
Oregon State Police;  
STATE OF OREGON;  
CURRY COUNTY;  
CITY OF BROOKINGS;

Defendants.

In her second amended complaint, plaintiff seeks damages pursuant to 42 U.S.C. § 1983 and the Oregon Wrongful Death Act, ORS 30.020, 30.075.

Plaintiff's action is based on the events which led to Donald Taylor's death on January 13, 1978. Plaintiff filed her original complaint on January 12, 1981. At that time, the statute of limitations recognized by this court for § 1983 actions was two years, based on ORS 12.110. Six months after plaintiff filed her complaint, the Ninth Circuit imposed a six-year limitations period on § 1983 actions. See Clark v. Musick, 623 F.2d 89 (9th Cir. 1980). Plaintiff filed her amended complaint (March 25, 1981) and second amended complaint (July 28, 1981) well within the six-year period. Two months ago, the Ninth Circuit reconsidered Clark, and ruled that the applicable statute of limitations for § 1983 actions filed in Oregon is again two years, based on the limitation period in the Oregon Tort Claims Act. See ORS 30.275(3); Kosikowski v. Bourne, 659 F.2d 106 (9th Cir. 1981). Accordingly, plaintiff's 42 U.S.C. § 1983 claims are time-barred.

Plaintiff argues that this court should apply the three-year statute of limitations

in ORS 30.020(1), apparently because her constitutional claims arise from an alleged wrongful death. As stated in Kosikowski, the Oregon Legislature clearly intended the Oregon Tort Claims statute to apply to 42 U.S.C. § 1983 actions. The wrongful death limitation period would be applicable only if this court had pendent jurisdiction. Once the federal claim is dismissed, this court does not have jurisdiction over the state claim. Accordingly, I find that the proper statute filing period is two years, and that this action should be dismissed as time barred.

DATED this 23rd day of November, 1981.

---

MICHAEL R. HOGAN  
U.S. Magistrate

No. 83-331

---

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

---

KATHY SHIRILLA, as Personal Representative  
of the Estate of Donald Andrew Taylor,  
Deceased,

Petitioners,

v.

CLAY SMALLWOOD, et al.,

Respondents.

---

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

---

BRIEF IN OPPOSITION  
on behalf of  
RESPONDENTS SMALLWOOD, HAWKINSON,  
FINLEY, RISTE, DENTON, HENDERSON  
AND CURRY COUNTY

---

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Henderson and Curry County

COUNTERSTATEMENT OF QUESTION  
PRESENTED FOR REVIEW

Where Petitioner brought an action under 42 U.S.C. § 1983 on behalf of the deceased in which she claimed that the deceased's civil rights had been violated at the time of the deceased's alleged wrongful death more than two years earlier, did the United States Court of Appeals for the Ninth Circuit correctly affirm the ruling of the District Court that the action was time-barred under the Oregon Tort Claims Act two-year statute of limitations based on an express provision in that statute specifically covering such an action?

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

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No. 83-331

---

KATHY SHIRILLA, as Personal Representative  
of the Estate of Donald Andrew Taylor,  
Deceased,

Petitioners,

v.

CLAY SMALLWOOD, et al.,

Respondents.

---

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
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---

BRIEF IN OPPOSITION  
on behalf of  
RESPONDENTS SMALLWOOD, HAWKINSON,  
FINLEY, RISTE, DENTON, HENDERSON  
AND CURRY COUNTY

---

STATUTES

Several of the statutes set  
forth in the Petition (Pet. Br. 7-13)  
are incorrect. The applicable statutes  
in effect at the time this action was

filed are as follows:

O.R.S. 30.265(1): "Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. As used in ORS 30.260 to 30.300 [the Oregon Tort Claims Act], 'tort' includes any violation of 42 U.S.C. section 1983."

O.R.S. 30.275(3): "No action [under the Oregon Tort Claims Act] shall be maintained unless such notice has been given and unless the action is commenced within two years after the date of such accident or occurrence. \* \*

\*" [While O.R.S. 30.275(3) was amended in 1981, the two-year statute of limitations is still in existence in O.R.S. 30.275(8), which became effective January 1, 1982,

and which is set forth in the Petition at pages 10-11.]

#### STATEMENT OF THE CASE

The only relevant facts are that Petitioner filed an action on behalf of the deceased in which she claimed that the deceased's civil rights were somehow violated because of the deceased's alleged wrongful death. The action was expressly brought under 42 U.S.C. § 1983, and it was filed more than two years after the deceased's death.

The District Court dismissed Plaintiff's 1983 action as time-barred under the two-year statute of limitations in the Oregon Tort Claims Act [O.R.S. 30.275(3)]. The United States Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF ARGUMENT AS TO REASONS  
WHY THIS COURT SHOULD DENY CERTIORARI

1. The decision of the United States Court of Appeals for the Ninth Circuit in this matter is in harmony with decisions of this Court on the application of state statutes of limitations to federal civil rights actions.

2. The Ninth Circuit's decision is in harmony with other courts of appeal as to the appropriateness of a two-year statute of limitations, the application of state tort claims acts, deference to legislative characterization, and the validity of state policies.

3. The Ninth Circuit's decision raises no unusual questions that call for an exercise of this Court's power of supervision.

4. The Ninth Circuit fully considered and correctly decided this matter.

## ARGUMENT

## I.

The Ninth Circuit's decision is in harmony with decisions of this Court on the application of state statutes of limitations to federal civil rights actions.

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Where, as here, a state statute of limitations by its specific terms applies to a federal civil rights action, it is applied without resort to characterization analysis. Johnson v. Railway Express Agency, 421 U.S. 454, 456 n.2, 462 (1975). Considerations of federalism leading to application of limitations provisions chosen by a state legislature are appropriate in Section 1983 actions. Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980). Thus, the characterization analysis contended for by Petitioner (Pet. Br. 16-21) is not only unnecessary, it is also inappropriate.

Petitioner fails to cite this

Court's decision in Johnson v. Railway Express Agency, which applied a one-year state statute of limitations to a Section 1981 action. The state statute covered personal tort actions, including those "brought under the federal civil rights statutes." 421 U.S. at 456 n.2. In applying the one-year statute of limitations, this Court specifically rejected the argument that failure to allow a longer time (by applying a tolling rule) "would conflict seriously with the broad remedial and humane purposes" of federal law (421 U.S. at 465), and stated that there was "no conflicting federal policy to protect" (id. at 467).

This Court has expressed its approval of state policies underlying limitations on civil rights actions. Those policies include preventing stale claims, facilitating investigation, and

preventing unfair surprise. Tomanio, 446 U.S. at 487; Johnson, 421 U.S. at 464, 467 n.14. The policy behind Oregon's Tort Claims Act cannot simply be dismissed as "designed solely to protect the state treasury." (Pet. Br. 21)

In both Tomanio and Johnson, the plaintiff had pursued a federal civil rights action only after pursuing an independent remedy (Tomanio was litigated through state courts, while Johnson pursued a Title VII [42 U.S.C. §§ 2000(e) et seq.] action). The policies against staleness, competing investigation, and unfair surprise set out by this Court in those cases apply even more strongly here, where no action or proceeding of any kind was filed before Petitioner's untimely civil rights complaint.

As will be discussed below, the decision of the Ninth Circuit, which

affirmed the dismissal of Petitioner's complaint because of a specific legislative two-year statute of limitations, is in harmony with this Court's stated policies of (1) looking first to legislative characterization, (2) holding such a characterization, even for periods as short as one year, to be consistent with federal civil rights policy, and (3) affirming the policies underlying state limitations statutes.

## II.

The Ninth Circuit's decision is in harmony with other courts of appeal as to the appropriateness of a two-year statute of limitations, the application of state tort claims acts, deference to legislative characterization, and the validity of state policies.

---

Petitioner erroneously contends that the Third, Fourth, and possibly Eighth Circuits are in conflict with Kosikowski v. Bourne, 659 F.2d 105 (9th

Cir. 1981), which the Ninth Circuit declined to overrule in this matter.

(Pet. Br. 18) The rule of Kosikowski is that Section 1983 actions against Oregon local government bodies and public officials are governed, due to legislative characterization, by the two-year statute of limitations contained in the Oregon Tort Claims Act. 659 F.2d at 107.

A. No circuit has held that the federal courts may indulge in their own characterization analysis where, as here, the state legislature has specifically characterized a civil rights action.

The Ninth Circuit in Kosikowski found that it was bound by legislative characterization and need not indulge in its own characterization analysis, at least where the state statute of limitations was not inconsistent with federal law. 659 F.2d at 107, 108 n.3. The cases cited by Petitioner (Pet. Br. 18-21) do

not hold otherwise, but agree that legislative characterization shall be applied unless inconsistent with federal policy, rather than being abandoned in favor of judicial characterization.

Knoll v. Springfield Tp. School Dist., 699 F.2d 137 (3d Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3859 (U.S. May 20, 1983) (No. 82-1889), involved a judicial choice between "two residuary provisions of the limitations scheme" where that scheme "fail[ed] to reveal any provision expressly applicable." 699 F.2d at 141. The Court in Knoll was not faced with a specific legislative characterization of Section 1983 actions and based its holding on incompatibility of a six-month statute of limitations with federal policies. 699 F.2d at 142. Because the Court in Knoll did not set aside an express legislative character-

ization, and the decision in that case is based on federal policy rather than judicial characterization, it does not address the Kosikowski rule that federal courts need not characterize when a state legislature has already done so.

In Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), a state statute specifically providing for a one-year limitation on Section 1983 actions alone, passed in reaction to an earlier decision of the Fourth Circuit and repealed after four years, was not applied because it specifically discriminated against the federal cause of action. 582 F.2d at 1318, 1319. The Court found that there was "no rational basis for distinguishing between § 1983 actions and actions for injury to the person" and that there was no "fair grouping and valuation of § 1983 actions

within the Virginia scheme of limitation . . . ." 582 P.2d at 1319. Here again, the state limitations period was set aside, not because of judicial characterization, but because of a federal policy -- that against hostility to federal claims. Such a policy cannot defeat the legislative characterization which controlled in Kosikowski and in this matter, where all state and federal torts by public bodies and officials are treated equally. In the other Fourth Circuit case cited by Petitioner, Almond v. Kent, 459 P.2d 200 (4th Cir. 1972), the Court was not faced with "a statute of limitations which is specifically made applicable to Section 1983 suits," and "therefore" had to "grapple with the Virginia general statute of limitations." 459 P.2d at 203.

Petitioner suggests that the Eighth Circuit may be in conflict with

Kosikowski, citing Garmon v. Foust, 668 F.2d 400 (8th Cir.), cert. denied, 456 U.S. 998 (1982), and Rosales v. Lewis, 454 F. Supp. 956 (S.D. Iowa 1978).

(Pet. Br. 18 n.1) However, the Court in Garmon found that "Iowa has no specific statute of limitations for Section 1983 actions" and that the Iowa Tort Claims Act was not raised. 668 F.2d at 405 & n.9. In Rosales, the court held that there was no specific state statute that applied (454 F. Supp. at 959), but that "[w]hen a state statute of limitations exists which clearly governs and is directly related to the federal civil rights claims, the Court need not search for a limitations period which would apply only in a remotely analogous manner " (id. at 958).

Thus, the cases cited by Petitioner simply reemphasize the rule

of Kosikowski -- where there is no expressly-labeled state limitations statute, a court must characterize the action by analogy and then compare federal policy; but where there is such an express statute, as here, it must be applied by the court unless policy dictates otherwise.

B. No circuit has held that a two-year limitations period violates the policies underlying federal civil rights law.

While there may be a split among the circuits on the appropriateness of a six-month limitations period (Knoll, 699 F.2d at 146 n.1 [statement of Adams, J., on denial of rehearing]), there is no disagreement that a two-year limitations period is sufficient time for a plaintiff to file a civil rights action. In Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983), a two-year statute was found

"surely adequate to permit a suit to be brought." 708 F.2d at 103. The Court in Aitchison distinguished its earlier decision in Knoll as being based on the inadequacy of a six-month period.<sup>1/</sup> Id. It is noteworthy that the Court in Aitchison specifically approved the state policy of having a shorter limitations period for public defendants, citing the Ninth Circuit's decision in Kosikowski. Id.

The Fourth Circuit, in rejecting a hostile one-year limitations period, returned to the two-year limitations period which had been applied in Almond v. Kent. Johnson v. Davis, 582 F.2d at

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<sup>1/</sup>

It should be noted that the Court in Aitchison, in the absence of an express statutory provision, applied characterization to reject a six-year statute of limitations. In this matter, by contrast, the Ninth Circuit applied an express statutory provision and rejected Petitioner's argument that a three-year limitations period applied instead.

1318. That Court also upheld the policy of promoting the prompt enforcement of claims. Id. at 1319.

The Eighth Circuit's choice of a five-year rather than a two-year statute of limitations in Garmon was based on rejection of a characterization analogy, not on a finding that a two-year limitations period would violate federal policy. 668 F.2d at 406. In the other case from the Eighth Circuit cited by Petitioner -- Rosales v. Lewis -- a two-year statute of limitations was approved. 454 F. Supp. at 960.

Therefore, there is no conflict between the cases cited by Petitioner and the two-year statute of limitations approved by the Ninth Circuit in Kosikowski and again in this matter.

C. No circuit has rejected a limitations period embodied in a state tort claims act.

Petitioner claims that the Third Circuit is in conflict with Kosikowski. (Pet. Br. 18-21) The Court in Aitchison, however, applied a state tort claims act's two-year statute of limitations to a Section 1983 action even though that act did not specifically include civil rights actions. 708 F.2d at 101, 103. The Fourth Circuit case cited by Petitioner -- Johnson v. Davis -- involved a specific hostile statute, not a state tort claims act. 582 F.2d at 1318. As noted above, the state tort claims act was not even raised in Garmon. 668 F.2d at 405 n.9.

### III.

The Ninth Circuit's decision raises no unusual questions that call for an exercise of this Court's power of supervision.

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Contrary to Petitioner's con-

tention (Pet. Br. 21-26), the Ninth Circuit's decision in this matter is not so unusual or important as to invoke this Court's special scrutiny. The two-year statute of limitations applied in this matter is much more lenient than the one-year limit approved by this Court in Johnson v. Railway Express Agency. It is a far cry from the six-month limitations period struck down in Knoll.

There is here no question of discrimination against federal causes of action, a question which this Court reserved in Johnson. 421 U.S. at 462 n.7. As noted above in the discussion of Petitioner's misplaced reliance on Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), the Oregon statute (Tort Claims Act) contains a "fair grouping" of federal and state causes of action, applying a two-year statute of limitations

equally to Section 1983 actions, wrongful death actions, and other tort actions against all public bodies and officers whether federal or state. O.R.S. 30.265(1), 30.275(3).<sup>2/</sup>

Petitioner erroneously contends that the state choice of a two-year limitations period amounts to an impermissible grant of sovereign immunity against all actions commenced after two years. (Pet. Br. 23) If this were true, then all statutes of limitations would constitute grants of sovereign immunity, not just those which limit the liability of public bodies and officials.

---

2/

Indeed, the legislative history of the Oregon Tort Claims Act suggests that fair grouping or consistency was a goal in including Section 1983 actions within the purview of the statute. Minutes of the Oregon House Judiciary Committee, May 24, 1977.

Such a sweeping approach finds no support in the law. Taken at face value, Petitioner's reasoning would require that Section 1983 actions be available in perpetuity and that Johnson v. Railway Express Agency be overruled. Such a rule was rejected in Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980), and in Robertson v. Wegmann, 436 U.S. 584, 592 (1978).

The applicable two-year statute of limitations in the Oregon Tort Claims Act implements the approved state policies discussed above and does not significantly affect "the principal policies embodied in § 1983 . . . since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within [the limitations period]." Tomanio, 446 U.S. at 488.

Finally, Petitioner erroneously

contends that Loiseau v. Dept. of Human Resources of State of Or., 558 F. Supp. 521 (D. Or. 1983), is an example of confusion imposed upon district courts by Kosikowski. (Pet. Br. 24) The Court in Loiseau followed the Kosikowski rule for Section 1983 actions. 558 F. Supp. at 523. Also, Loiseau involved a Section 1981 action, which the Court in that case and the Court in Kosikowski specifically noted has not been characterized by the Oregon legislature. 659 F.2d at 108 (on rehearing); 558 F. Supp. at 526. Properly turning to judicial characterization in the absence of legislative characterization, the Court in Loiseau applied the Oregon Tort Claims Act's limitations period by analogy. 558 F. Supp. at 527. Moreover, even if there were some confusion as to the application of Kosikowski to Section 1981 actions, such confusion is simply irrelevant in a Section 1983 action such

as this matter.

IV.

The Ninth Circuit fully considered and correctly decided this matter.

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This matter was fully briefed and fully considered by the Ninth Circuit. Petitioner's arguments below, based on alleged violations of federal civil rights policy and constitutional law, were rejected. The case was correctly decided. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Kosikowski v. Bourne, 659 F.2d 105 (9th Cir. 1981); Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983).

CONCLUSION

For the above reasons, the  
Petition for Writ of Certiorari should  
be denied.

DATED: October 28, 1983.

Respectfully submitted,

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OCT 31 1983

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CLERK

No. 83-331

# In the Supreme Court of the United States

OCTOBER TERM, 1983

KATHY SHIRILLA, as Personal  
Representative of the Estate  
of Donald Andrew Taylor,  
Deceased,

Petitioner,

v.

CLAY SMALLWOOD, et al

Respondents.

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF RESPONDENTS STATE OF OREGON AND  
DONALD SMITH IN OPPOSITION

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## **QUESTIONS PRESENTED**

1. When state law expressly provides a two-year statute of limitations for the commencement of a 42 U.S.C. § 1983 claim in the state's courts, is a federal court nonetheless required to compare a § 1983 claim commenced in the federal district court for the state to other state causes of action in tort to determine the pertinent period of limitations for the commencement of the federal action?

2. Is a federal court's application of a state's two-year period of limitation for the commencement of a § 1983 claim inconsistent with the Constitution or the federal policies embodied in 42 U.S.C. § 1983?

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**BRIEF FOR RESPONDENTS STATE OF  
OREGON AND DONALD SMITH  
IN OPPOSITION**

---

**OPINIONS BELOW**

**JURISDICTION**

**CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

Petitioner's statement of these matters is accepted.

**STATEMENT OF THE CASE**

The state<sup>1</sup> accepts petitioner's statement of the course of proceedings and disposition of the case below. The state offers the following alternative statement of relevant facts.

Petitioner alleged in her second amended complaint (C.R. 30) that her husband, Donald Andrew Taylor, was shot and killed on January 13, 1978, by a Curry County Deputy Sheriff. Petitioner alleged that the shooting occurred during a law enforcement action jointly planned by all of the defendants.

On January 12, 1981, three years after the incident, petitioner filed this action for damages, pursuant to 42 U.S.C. § 1983, in the United States

---

<sup>1</sup>The Department of Justice of the State of Oregon files this brief on behalf of respondents the State of Oregon and Donald Smith, an Oregon State Police officer. In this brief, the term "the state" refers to these respondents. The status of the State of Oregon as a party was not resolved by the court below.

District Court for the District of Oregon. In her second amended complaint, petitioner stated that she brought this action pursuant to the following Oregon statutes: (1) O.R.S. 30.275, a section of the Oregon Tort Claims Act which includes a provision that all actions be commenced within two years of the date of the accident or occurrence, O.R.S. 30.275(8); and (2) O.R.S. 30.020, a section of the Oregon Wrongful Death Act which requires that all wrongful death actions be commenced within three years after the occurrence of the injury causing the death of the decedent. (C.R. 30, p. 12).

### **REASONS FOR DENYING CERTIORARI**

The Ninth Circuit properly held that the two-year statute of limitations contained in Oregon's Tort Claims Act applied to all § 1983 actions against state officers, including those actions seeking recovery for civil rights violations resulting in death. The court based its decision in this case on its recent decision in *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). It correctly determined the applicable statute of limitations by referring to the Oregon legislature's statutory designation of the appropriate limitation period. The state statutory scheme clearly designates the period of limitations to be applied in § 1983 actions, and, therefore, the federal court was not required to engage in the legal exercise of characterizing the federal claim and attempting to

analogize it to a similar state claim. This court's decisions establish that a clearly chosen state statute of limitations will be applied to § 1983 actions commenced in federal court, unless that statute demonstrates hostility to the federal action. No hostility is manifest or inherent in the two-year statute of limitations chosen by the Oregon legislature.

There is no conflict between this Ninth Circuit decision and decisions in other federal courts of appeals. For this reason, the Ninth Circuit decision does not merit this Court's review. Nor is review required for the other reasons put forth by petitioner.

The Oregon legislature has not limited its liability for federal constitutional torts as petitioner asserts. Petitioner had the same two years in which to bring her tort claims action against these defendants in Oregon courts, as she had in which to bring her federal "constitutional tort" action against these defendants in Oregon federal district court. The decision below does not, as petitioner asserts, stand for the proposition that the Oregon state legislature can dictate the boundaries of petitioner's federal rights. The Ninth Circuit correctly determined that the statute of limitations chosen by the Oregon legislature does not interfere with petitioner's

assertion of her federal constitutional rights. The decision below should be allowed to stand.

1. **The decision below is consistent with this Court's decisions and its reasoning in determining the correct state statute of limitations to be applied to 42 U.S.C. § 1983 actions.**

It is established law that in actions under the Civil Rights Acts of 1871 (including 42 U.S.C. § 1983), as well as in many other federal causes of action, the federal court will borrow the applicable period of limitations from the law of the state in which the claim arose. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 100 S. Ct. 1790, 64 L. Ed.2d 440 (1980). In attempting to determine the appropriate state statute of limitations, federal courts often are forced first to characterize the federal claim asserted and then to apply the statute of limitations applicable to the state law claim which is most analogous to the federal claim being made. Analogizing the federal claim to a state claim is merely a tool for determining which state statute of limitations should be applied. When the state legislature specifically has determined the appropriate statute of limitations to apply to the federal action, this analytical tool is no longer needed.

As the Ninth Circuit stated in *Kosikowski v. Bourne*, *supra*, 659 F.2d at 107:

This precise expression of the intent of the Oregon legislature makes unnecessary a resort to a characterization of appellant's cause of action

in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made the selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the defendant's claims rest."

Petitioner claims that under this Court's decisions the Ninth Circuit was required to "characterize" the nature of the federal claim asserted and to determine its state analogue. The cases cited by petitioner do not require such characterization when the applicable state statute of limitations is clear. In *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696, 706, 86 S. Ct. 1107, 16 L. Ed.2d 192 (1966) this Court considered which of two state statutes of limitations should apply in a federal action under section 301 of the Labor Management Relations Act. It found that characterization of the federal claim to be unnecessary:

"We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. [Citations omitted]. But there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy. [Citations omitted]." 383 U.S. at 706.

In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S. Ct. 1559, 67 L. Ed.2d 732 (1981), this Court reiterated the characterization test was

unnecessary in the face of a clear state statutory position.

"Obviously, if New York had adopted a specific six-year statute of limitations for employee challenges to awards of a joint panel or similar body, we would be bound to apply that statute under the reasoning of *Hoosier Cardinal*." 451 U.S. at 64.

The Ninth Circuit followed the decisions of this Court in applying the unambiguous Oregon statutory limitation period of two years to petitioner's § 1983 claim.

**2. The decision below does not conflict with decisions in other federal courts of appeals.**

Petitioner asserts that the decision in this case is "in conflict with the approach taken by the courts of appeals" for the Third, Fourth, and possibly the Eighth Circuit Court of Appeals. (Petition p. 18). None of the cases petitioner cites involved the question whether the federal court was required to undertake a characterization test in the face of clear state statutory language establishing a period of limitation for the commencement of a § 1983 action. Nor did any of the cases involve a state statutory scheme such as Oregon's format, in which a plaintiff has the same amount of time to bring a tort claim against government defendants in state courts as he or she has to bring a § 1983 claim against the same defendants in federal court. A review of the cases cited by petitioner reveals no split among the

circuits on any issue decided by the Ninth Circuit in this case.

In the Fourth Circuit decisions, the court found hostility toward federal § 1983 causes of action in a Virginia statute that provided a shorter limitation period for § 1983 claims than for the analogous state tort actions. *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978); *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972). The Oregon statutory scheme does not discriminate against § 1983 actions; an identical two-year statute of limitations applies to state tort actions brought against public bodies and public employees, and to § 1983 actions brought in federal court against public bodies and public employees.<sup>2</sup>

Nor does the decision below conflict with decisions of the Third Circuit, *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3rd Cir. 1983), *cert. pet. pending*, and *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). In *Knoll*, the Third Circuit held that application of Pennsylvania's six-month statute of limitations governing suits against governmental officials was inconsistent with the policies and legislative history underlying the civil

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<sup>2</sup>Petitioner attempted below to characterize her § 1983 action as a wrongful death action under Oregon's Wrongful Death Act, in order to take advantage of that Act's three-year statute of limitations. O.R.S. 30.020(1). Under Oregon law, however, a wrongful death action can be brought only against private defendants and not against public bodies and public employees. *Housin v. Morse Bros.*, 32 Or. App. 491, 574 P.2d 361 (1978). Tort actions against public bodies and employees for all injuries, including death, can be brought in Oregon courts only under provisions of the Oregon Tort Claims Act, which include a two-year statute of limitations.

rights acts. The court found that such a short statute of limitations failed to preserve the remedial spirit of federal civil rights actions. 699 F.2d at 142. Petitioner makes no attempt to demonstrate that Oregon's two-year statute of limitations is likewise insufficient to preserve the remedial spirit of federal civil rights actions under the reasoning of the *Knoll* decision.<sup>3</sup>

Finally, there is no conflict between this case and the Eighth Circuit case cited by petitioner, *Garmon v. Foust*, 668 F.2d 400, *cert. den.* — U.S. — , 102 S. Ct. 2283, 73 L. Ed.2d 1294 (1982). The Eighth Circuit held that the § 1983 federal action before it was more analogous to Iowa's general statutory cause of action than to the state's common law tort cause of action. The court therefore held that the statute of limitations for the statutory cause of action should be applied. This decision is beside the point of the Ninth Circuit decision, review of which is sought by petitioner.

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<sup>3</sup>In *Knoll*, the court discussed the fact that under Pennsylvania law (as under Oregon law), different statutes of limitations can be applied to similar tort claims depending on whether the suits involve private or public defendants. In a later case, the Third Circuit clarified its point that the variance in the statute of limitations applicable to private and public defendants was not the basis of its holding in *Knoll*.

"Rather, *Knoll* is bottomed on the inadequacy of the six-month period and the court's decision would have been the same if the identical limitation applied to private defendants as well." *Aitchison v. Raffiani*, 708 F.2d 96, 103 (1983).

**3. The decision below does not grant a state the ability to limit its liability for constitutional torts in a manner that is inconsistent with the Constitution and laws of the United States.**

- A. A statute of limitations in a state tort claims act is a procedural rule; not an assertion of sovereign immunity.

Petitioner correctly asserts that a state may not assert sovereign immunity to protect its officers from a federal § 1983 action. (Petition p. 22). The State of Oregon's passage of a *two-year* statute of limitations applicable to § 1983 actions is not, however, an assertion of sovereign immunity. This statute of limitations does not completely foreclose the making of a claim against state officials; it merely limits the time during which a plaintiff may bring an otherwise actionable claim against a state officer under Oregon's Tort Claims Act. Because the statute prescribes a period of limitation which is not unreasonably short, the statute confers no more "immunity" on the state or its officers than any other statute of limitations generally confers on private defendants.

Petitioner's citation to *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) is misleading. In *Donovan* California municipal employees attempted to assert certain governmental immunities to a federal § 1983 action. If a similar action had been brought against the employees in California state courts under the state's tort claims act, the immunities would have been available to the defendants. The Ninth Circuit

properly held that the state immunities could not be used to defend against a § 1983 action. The court did not hold that a statute of limitations was an assertion of sovereign immunity. The Ninth Circuit's decision in *Donovan* is not inconsistent with its holding in this case.

B. The decision below does not imply that state legislatures can dictate the boundaries of federal rights.

Under 42 U.S.C. § 1988 federal courts are directed to follow a state statute establishing a procedural rule "so far as the same is not inconsistent with the constitution and laws of the United States." In *Kosikowski v. Bourne*, *supra*, relied on by the court below in this case, the Ninth Circuit held that it must apply the two-year statute of limitations which the Oregon legislature had determined should apply to § 1983 actions. 659 F.2d at 108. The Ninth Circuit cited two cases in support of its implicit holding that Oregon's two-year statute of limitations is not inconsistent with the United States Constitution or federal statutes: *Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981) (holding that Arizona's one-year statute of limitations for actions upon liability created by statute was consistent with the constitution and laws of the United States); and *United Parcel Service, Inc. v. Mitchell*, *supra*, 101 S. Ct. 1559, 1564-65 (holding that New York's 90-day statute of limitations for actions to

vacate arbitration awards was consistent with the purposes of the National Labor Relations Act). Petitioner ignores these cases which support the Ninth Circuit's finding that it must accept the Oregon legislature's two-year statute of limitations. Moreover, petitioner points to no federal interests or policies which are adversely affected by application of Oregon's two-year statute of limitations to § 1983 actions.

### CONCLUSION

The Ninth Circuit properly held that the two-year statute of limitations contained in Oregon's Tort Claims Act applies to federal § 1983 actions. The decision is consistent with the decisions of this Court and with the decisions of other federal circuit courts. Oregon's statute of limitations is consistent with the constitution and laws of the United States, and it evidences no hostility to federal civil rights actions. The petition for writ of certiorari should be denied.

Respectfully submitted,

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